

***United States Court of Appeals
for the Second Circuit***



PETITION

ORIGINAL

11-5004

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

HOUSEHOLD FINANCE CORPORATION,

Plaintiff-Appellant,

-against-

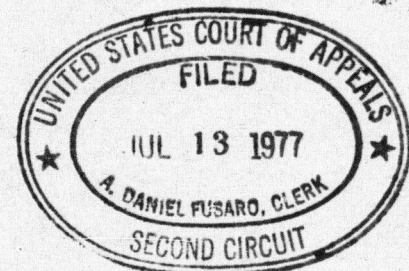
KEITH ORIN DANNS, a/k/a KEITH O.
DANNS, a/k/a KEITH DANNS,

Defendant-Appellee.

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

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HARVEY N. GOLDSTEIN
Of Counsel



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-5004

HOUSEHOLD FINANCE CORPORATION,
Plaintiff-Appellant,

v.

KEITH ORIN DANNS, a/k/a KEITH O.
DANNS a/k/a KEITH DANNS,

Defendant-Appellee.

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT:

Appellant Household Finance Corporation
respectfully submits this petition for rehearing and
suggestion for rehearing in banc pursuant to Rules 35
and 40 of the Federal Rules of Appellate Procedure.

The decision herein (per Lumbard, C.J. and

the late Associate Justice Clark and Meskill, C.J. concurring) the first one at the federal appellate level, dealt with the issue arising under §17 (a)(2) of the Bankruptcy Act of whether a dishonest bankrupt is entitled to a discharge of a liability fraudulently incurred. This is an issue which has split the district courts in this Circuit. The decision fails to settle the issue authoritatively. This is because the decision has misapprehended both the facts and the law.

Authoritative resolution of this issue which is of exceptional importance to bankrupts and the consumer finance industry should be had, preferably by this Court in banc. In light of what follows, the Court is urged to address the problem in a manner that will serve as a viable precedent for the courts of other circuits that will undoubtedly be called upon to pass on the issue.

The Facts

Danns, on the basis of a glaringly false financial statement, sought and obtained a refinancing of his then existing loan with HFC (A 30)* His old note of \$2019.37 was cancelled and he executed a new note for \$2500.00 (exclusive of finance charges) (Ex. 1 at A 75). The new note involved different monthly payments, a new and extended maturity date (36 months hence) and a moratorium in making the next payment since the first payment on the new note was not due until thirty days after its execution.

When Danns filed in bankruptcy about a year after the refinancing, his liabilities included his obligation on the aforesaid new note (A 7).

HFC in the course of the bankruptcy sued to bar Danns' discharge on the ground that, pursuant to Bankruptcy Act §17(a)(2), "the defendant having obtained credit or an

*References are to the appendix and to appellant's main brief

extension or renewal of credit, upon a materially false statement in writing in respect to his financial condition, is not entitled to have that obligation discharged in bankruptcy" (A 14).

At the trial, Tillinghast, the manager of the HFC branch at which Danns had deac, testified in pertinent part as follows (A 45 - A 46):

"Q. Did there come a time in tl course of your duties when you were called upon to approve or to disapprove a loan to Mr. Danns on that date (January 24, 1975)?

A. Yes sir.

Q. And did you so approve the loan, Mr. Tillinghast?

A. Yes, I did.

Q. And in approving the loan did you rely on the financial statement marked Plaintiff's Exhibit 2?

A. Yes sir; I did.

Q. Would you have made this loan or extended credit to Mr. Danns if you had known that the bankrupt was indebted to Beneficial Finance for approximately \$1,000.00, to Ford Motor Company for approximately \$3,100, to the Chemical Bank for approximately \$3,100, to the First National City Bank for approximately \$2,900.00, to Macy's for approximately \$1,000.00 and to W.T. Grant & Company for approximately \$953.00, Mr. Tillinghast? (emphasis supplied).

A. The answer is, no."* (matter in parenthesis supplied).

The Bankruptcy Judge found what has been unchallenged on this appeal, namely that Danns had given a financial statement which was materially false in writing with intent to deceive and that it was relied upon by HFC. However, the Bankruptcy Judge ignored the liability incurred by Danns in connection with the refinancing as evidenced by the new note he had executed and Danns' bankruptcy schedules and restricted HFC'S recovery to the amount of "fresh cash" Danns had secured as a result of the refinancing. HFC contended on this appeal that it should have had judgment under §17(a)(2) for the unpaid balance of the new note.

Argument

1. The Misapprehension of the Facts.

The panel erred in oversimplifying the nature of the transaction. The oversimplification consisted

*See the statement (op. p. 4517) that "Here there was no evidence that the original loan was renewed in reliance on the false representation." The transaction did not involve a renewal (Main Br. p. 4). The quoted unchallenged testimony clearly shows an extension of credit within §17(a)(2).

in characterizing the transaction as Danns having "obtained an additional loan of \$483" (op. p. 4514). With this erroneous splitting of the transaction as a foundation, it was inevitable that the panel would conclude that "the only credit extended in reliance on Danns' misrepresentation was the additional loan" (op. p. 4517-4518).

The panel overlooked the uncontradicted evidence at trial that Danns received much more than the \$483. When Danns executed the new note he obtained a new maturity date (36 months hence), a schedule of different monthly payments and a moratorium in making the next payment since the first payment on the new note was not due until 30 days after its execution. As the panel said (op. p. 4517) the record is silent as to the terms of Danns' original loan which was refinanced. However, the panel overlooked the legitimate inference from Danns' trial testimony that he had sought and obtained a renewal of his original obligation (A 30, A 64, A 66). A renewal of a loan surely implies an extended maturity date for the new loan.

The panel also overlooked the unchallenged testimony at trial of Tillinghast that the single transaction with Danns involving the new note would not have occurred

but for the submission of the false financial statement. The single transaction consisted of the granting of additional credit to Danms and the extension of his then existing loan. Thus the transaction came squarely within Bankruptcy Act §17(a)(2) which bars a discharge as to liabilities "for obtaining money or property on credit or obtaining an extension * * * of credit in reliance upon a materially false statement in writing respecting his financial condition made * * * with intent to deceive."

2. The Misapprehension as to the Law.

In affirming, the panel oversimplified its approach to §17(a)(2). In holding that the proper construction of the statute "is unmistakable" and in concluding that the language "strongly implies that the creditor should be entitled to bar discharge only of that portion of his loan as was obtained fraudulently" (op. p. 4516), the panel adopted an interpretation of the statute which is at odds with all prior decisions and the writings of all leading commentators. In framing this unique interpretation the panel has ignored the many decisions on both sides of the issue since 1960. None has found the proper construction

of the statute unmistakable. Surely this thorny issue which was first grappled with by the state courts and now has split the district courts, is entitled to more consideration.*

The panel's view of the legislative intent in connection with the Celler Amendment (op. pp. 4516-4517) overlooks the carefully considered contrary view of the highest courts of the states that passed on the matter, of District Judge Newman in Fields and of leading commentators such as Collier and Professor Schuchman.

Apart from the foregoing errors the panel strongly suggests (op. fn.6) that in any event it would not have adopted HFC'S contention because the rule contended for by HFC would encourage unscrupulous lenders to connive at false financial statements. However, Congress recognized the problem as early as 1960 (Hse. Rep. #1111, quoted in Main Br. p. 9) but nevertheless retained the false financial statement as a ground for denial of a discharge.

*The panel adopted uncritically the view of a single bankruptcy judge that the state courts were "in colossal error" in their interpretation of §17(a)(2) (op. fn.4).

Conclusion

Appellant HFC respectfully requests that this petition for rehearing be granted and that the order appealed from be reversed or, in the alternative, that the issue herein be resolved by this Court in banc. Since this case is the first at the federal appellate level to raise the issue of a dishonest bankrupt's entitlement to a discharge under §17(a)(2), it is a most appropriate vehicle for in banc consideration as being of exceptional importance in the administration of the Bankruptcy Act.

Respectfully submitted,

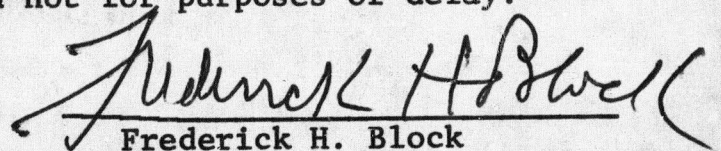
Seymour R. Weinick
Attorney for Defendant-
Appellant

Frederick H. Block
Harvey N. Goldstein
Of Counsel

July 13, 1977.

Certificate of Counsel

I certify that I have examined the foregoing petition and that in my opinion it is well founded and presented in good faith and not for purposes of delay.

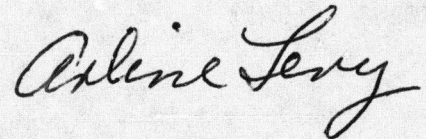
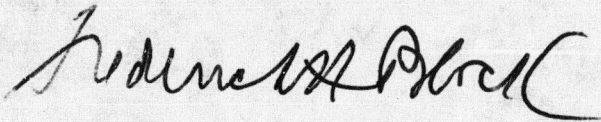

Frederick H. Block

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

Arline Levy being duly sworn deposes and says;
deponent is not a party to the action, is over 18 years
of age and resides at Queens, New York.

On July 13, 1977 deponent served the within
Petition for Rehearing with Suggestion for Rehearing
In Banc upon Sachs & Spector, Esqs. attorneys for
Defendant-Appellee at 570 7th Avenue, New York, N.Y.
and upon Scheinberg & Finno attorneys for New York
State Consumer Finance Association at 16 Court Street,
Brooklyn, N.Y. as amicus curiae and upon Kalman Finkel
attorney for the Legal Aid Society of New York, Civil
Division at 11 Park Place, New York, N.Y. as amicus
curiae the addresses designated by said attorneys for
that purpose by depositing 2 true copies of same enclosed
in a post-paid properly addressed wrapper in an
official depository under the exclusive care and custody
of the United States Postal Service within the State
of New York.

Sworn to before me this
13th day of July, 1977.



FREDERICK H. BLOCK
Notary Public, State of New York
No. 81-0322784
Qualified in New York County
Commission Expires March 30, 1979